IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DARNELL C. COOPER, Plaintiff	:	CIVIL ACTION
v.	:	NO. 06-0171
JEFFREY BEARD, et al., Defendants.	:	

Memorandum and Order

Yohn, J. November ___, 2006

Plaintiff Darnell C. Cooper is a prisoner in the custody of the Pennsylvania Department of Corrections ("DOC"). Plaintiff is currently incarcerated at SCI Dallas ("SCID"); during the relevant time period he was incarcerated at SCI Graterford ("SCIG"). Plaintiff brings this *pro se* complaint primarily under 42 U.S.C. § 1983 ("§ 1983") against DOC officials in Camp Hill, Pennsylvania: Jeffrey A. Beard, DOC Secretary; Sharon M. Burks, Chief Grievance Officer; Robert S. Bitner, Chief Hearing Examiner; and Donald Williamson, Diagnostic and Classification Coordinator; as well as against officials at SCIG: David DiGuglielmo, Superintendent; Michael Lorenzo, Deputy Superintendent for Internal Security; Thomas Dohman, Security Captain; and Leslie Hatcher, Grievance Coordinator (collectively, "defendants"). Presently before the court is a motion filed by defendants to dismiss plaintiff's complaint for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons described herein, the motion will be granted in part and denied in part.

I. Background and Procedural History

A. Plaintiff's Factual Allegations

On August 3, 2003, plaintiff learned that his visiting privileges with Renee Robinson had been suspended due to an incident that had occurred on July 6, 2003. (Compl. at 4, ¶1.) When plaintiff spoke to defendant Dohman about the matter, Dohman stated, "You're never going to see her again unless you help with something that I need." (*Id.*) The following day, another prison official reportedly advised defendant Dohman that the incident in question did not in fact involve Robinson (*id.* at 4.A, ¶2), and suggested to plaintiff that he write to defendant DiGuglielmo about the matter (*id.*), which plaintiff did (*id.* at 4.A, ¶ 3).

On August 5, 2003, Dohman asked plaintiff to actively participate in a proposed internal sting operation against corrupt prison guards whom Dohman suspected of smuggling drugs into the prison. (*Id.* at 4.A, ¶ 4.) Plaintiff explicitly refused Dohman's request, stating that he did not want to be involved. (*Id.*) Dohman threatened plaintiff that "you will or [you] will never get your visits back and I will transfer you out of here." (*Id.*) Dohman also told plaintiff that Dohman had added the telephone number of an individual who worked for the Federal Bureau of Investigation to plaintiff's pin number so that plaintiff could call him. (*Id.*) Later that day, plaintiff related these events to three individuals: plaintiff sent DiGuglielmo a letter (*id.*); plaintiff spoke to defendant Lorenzo who replied, "I think it's best that you follow Captain Dohman's advice" (*id.* at 4.A, ¶ 5); and plaintiff spoke to defendant Hatcher, who told plaintiff that he could file a grievance with her, but that the grievance would be reviewed by Lorenzo (*id.* at 4.A, ¶ 6).

In September 2003, plaintiff attempted to speak to DiGuglielmo about these issues. (*Id.* at 4.A-B, ¶ 7.) Robinson made numerous phone calls to DiGuglielmo about the suspension of her visits with plaintiff. (*Id.* at 4.A, ¶ 8.) That month, DiGuglielmo reinstated plaintiff's visits with Robinson. (*Id.*)

In October 2003, plaintiff tried to explain the situation to Lorenzo, while his supervisor was present. (*Id.* at 4.B, ¶ 9.) Lorenzo again advised plaintiff to cooperate with Dohman, stating, "you already said most of this to me before and you also sent [] Superintendent DiGuglielmo letters . . . I'm well aware of what's going on in my Security Department, and if it's something that I don't agree with, I would put a stop to it, understood?" (*Id.*) The same month, Dohman ordered the search team to seize all of plaintiff's property from his cell and take it to the security department, where it was kept overnight.[1] (*Id.* at 4.B, ¶ 10.) Also in October, Dohman reiterated his request to plaintiff that plaintiff participate in the sting operation. (*Id.* at 4.B-C, ¶ 11.) Dohman asserted that taking plaintiff's property was "only a very small thing that I could do" and went on to state that "I believe the hole or me having you transferred would be an even bigger inconvenience." (*Id.*) Dohman further advised plaintiff that attempting to write grievances to DiGuglielmo would be futile because those grievances would "be reviewed by Deputy Lorenzo." (*Id.*) Plaintiff responded that he was not interested in being involved. (*Id.*) Dohman returned plaintiff's property to him. (*Id.*) Immediately thereafter, plaintiff spoke to another prison official about these events and that official suggested plaintiff write an "Official Complaint and Grievance" to DiGuglielmo and/or write to the Office of Professional

[1]It is not clear from plaintiff's complaint exactly for how long plaintiff's property was confiscated. The property was returned the same month. (*See* Compl. at 4.B, ¶¶ 10-11.)

Responsibility. (*Id.*)

During the month of November plaintiff continued to seek attention to these events. On November 2, he wrote a letter to DiGuglielmo, requesting that it be treated as an "Official Complaint and Grievance" against defendants Dohman and Lorenzo (*id.* at 4.C, ¶ 12), attempted to speak to DiGuglielmo on November 21 (*id.* at 4.C, ¶ 14), and wrote to DiGuglielmo on November 24 and 25 (*id.* at 4.C, ¶¶ 16, 17). He copied his last letter to a number of prison officials, including defendants Beard, Williamson, and Lorenzo. (*Id.* at 4.C, ¶ 17.) He also directed his mother, Shirley W. Cooper, to contact the Office of Professional Responsibility and a state representative. (*Id.* at 4.C, ¶ 13.)

On November 27, 2003, Dohman told plaintiff that Dohman had learned from a reliable source that plaintiff had been in a fight in the main yard with inmate #EP-8184, on November 15, and that plaintiff had struck Officer Bell, on November 17, while located in the side yard. (*Id.* at 4.C, ¶ 18). Plaintiff denied both charges. (*Id.*) Dohman then stated to plaintiff, "If you can provide me with some information concerning officers bringing drugs and other contraband into the institution, I won't put you in the hole." (*Id.*) After plaintiff refused, Dohman said, "I'm going to make sure that you get transferred, because I believe you know more." (*Id.*) Dohman then called plaintiff's mother and instructed plaintiff to say goodbye to her. (*Id.*) Dohman stated, "I'm sorry to have to do this to you on Thanksgiving Day, but you don't leave me no choice [sic] being as though you don't want to work with me so I guess this is just one more thing you can complain about." (*Id.*) Plaintiff was removed from his promotional single cell and taken to the Restricted Housing Unit ("RHU"). (*Id.* at 4.C, ¶¶ 18, 19.) Plaintiff received a copy

of an "other report,"[2] indicating his placement in custody for investigative purposes related to an incident that took place that same day, November 27; Dohman was listed as the reporting, reviewing and investigating officer. (*Id.* at 4.C, ¶ 19.) Also that day, plaintiff filed a grievance to defendant Hatcher ("plaintiff's first grievance"). (*Id.* at 4.D, ¶ 20.) He followed up on that grievance on December 2, 4, 5 10, 17, and 23. (*Id.* at 4.D, 4.F-G, ¶¶ 21, 23, 25, 34, 41, 48.) On December 3, 4, and 8, plaintiff requested to various prison officials that potentially exonerating videotapes be reviewed (*id.* at 4.D-E, ¶¶ 22, 24, 27) and requested to speak to the Program Review Committee ("PRC") (*id.* at 4.E, ¶ 29). Plaintiff learned that another inmate had been charged with the assault and fighting in the main yard (*id.* at ¶ 26) and was told that videotape evidence had exonerated him, but that he had to remain in the RHU as a formality (*id.* at ¶ 31).

On December 10, 2003, plaintiff was charged with misconduct for assault and lying. (*Id.* at 4.F, ¶ 32.) According to the misconduct report, plaintiff had assaulted Officer Bell on November 17, 2003, and lied to Dohman when Dohman questioned him about it. (*Id.*) That day plaintiff wrote to the PRC about the misconduct report (*id.* at 4.F, ¶ 33) and apprised defendant Hatcher of these new events (*id.* at 4.F, ¶ 34). The next day he wrote to the PRC, contesting the allegations against him. (*Id.* at 4.F, ¶ 35.) Plaintiff and his mother filed complaints with the Office of Professional Responsibility (*id.* at 4.F, ¶¶ 36, 40) and plaintiff sent letters to Donald T. Vaughn, Deputy Regional Secretary for DOC (*id.* at 4.F, ¶ 37), and a state representative (*id.* at

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[2]The DOC uses the same form to charge inmates with misconduct and to place inmates in administrative custody. (Gov't's Mot. at 6 n.2.) When used for the issuance of a misconduct charge, the officer checks the box next to the words "Misconduct Report;" when used to place an inmate in administrative custody, the officer checks the box next to the word "Other." (*Id.*) Consequently, administrative custody reports are sometimes referred to as "Other Reports." (*Id.* citing *Drexel v. Horn*, 1997 U.S. Dist. LEXIS 8939, at *3 (E.D. Pa. June 20, 1997).)

4.G, ¶ 44). Plaintiff and his mother received responses from the Office of Professional Responsibility, directing plaintiff to utilize DOC procedures, specifically DC-ADM 801 and 804, to resolve the matter, and reporting that copies of their memoranda had been forwarded to DiGuglielmo. (*Id.* at 4.G, ¶¶ 43, 46.) Plaintiff filed a new grievance with Hatcher on December 17 ("plaintiff's second grievance"); he received a rejection on December 23. (*Id.* at 4.G, ¶¶ 41, 48.) The rejection stated he could appeal to DiGuglielmo. (*Id.* at 4.G, ¶ 48.) On the same day, plaintiff appealed that rejection ("appeal of plaintiff's second grievance") and explained that he had not received any response to plaintiff's first grievance, filed November 27. (*Id.* at 4.G, ¶ 49.) On December 29, 2003, DOC Hearing Examiner Mary Canino dismissed all charges against plaintiff relating to the incident with Officer Bell. (*Id.* at 4.G-H, ¶ 49.) Canino reported the surveillance tapes revealed plaintiff to be elsewhere, Officer Bell testified that she had not been assaulted and did not remember seeing plaintiff in the yard on the day in question, and Canino believed the "reliable source" to have lied. (*Id.*) Still, plaintiff was not released from the RHU. (*Id.* at 4.H, ¶¶ 51, 52.)

Plaintiff followed up with DiGuglielmo regarding plaintiff's appeal of his second grievance on December 29, 2003. On December 30, plaintiff was issued another "other report" stating that plaintiff was dangerous to others in the institution who cannot be protected by any other means.[3] (*Id.* at 4.H, ¶ 53.) The officer who authored the misconduct report related to plaintiff that the officer was "just following Captain Dohman's orders." (*Id.* at 4.H, ¶¶ 53, 54.) The same day, plaintiff again followed up with DiGuglielmo concerning plaintiff's appeal of his

[3]It is not clear if plaintiff was considered a danger to a particular prisoner. Plaintiff avers that the report stated "the inmate CC-5133 is a danger to others RS12 in the institution that cannot be protected by any other means." (Compl. at 4.H, ¶ 53.)

second grievance and in reference to the new misconduct he had been issued. (*Id.* at 4.H, ¶ 55.) He received a reply from DiGuglielmo on January 6, 2004 that stated a new reason for the administrative custody: "[T]here is some concern that you may be involved with a staff person." (*Id.* at 4.H, ¶ 57.) Plaintiff responded to that reply the same day. (*Id.* at 4.H, ¶ 58.)

On January 7, at plaintiff's PRC hearing, an officer stated that he would not get involved on behalf of plaintiff because "this is Captain Dohman's and Deputy Lorenzo's little project to deal with." (*Id.* at 4.I, ¶ 59.) On January 22, an officer in the RHU told plaintiff to "chill out" from writing to so many people because someone had been intercepting plaintiff's letters regarding Dohman and Lorenzo, and the "higher ups" were not happy about his complaints. (*Id.* at 4.I, ¶ 60.) Further, that officer had been instructed to write up a misconduct regarding plaintiff for anything the officer could come up with. (*Id.*)

On January 23, 2004, Dohman ordered all plaintiff's property be removed from his cell and taken to the Security Department. (*Id.* at 4.I, ¶ 61.) His property was returned to him the same day, but copies of grievances, complaints, letters to various DOC personnel, certain personal correspondence, and writing materials were removed. (*Id.* at 4.I, ¶ 62.) After obtaining a pen from a neighboring cell, plaintiff submitted a grievance against Dohman for the removal of his property ("plaintiff's third grievance"). (*Id.* at 4.I, ¶ 63.) The same day, plaintiff was taken to the Security Department where Dohman told him, "If you want out of the hole then help me with getting a few more notches under my belt by [firing] just a few people out of this jail's doors." (*Id.* at 4.I, ¶ 64.) Plaintiff again refused, to which Dohman responded, "Then I guess it's back to the hole for you and you better hope that I don't have you transferred out of the state because [] I can make that happen too." (*Id.*) Dohman also admonished plaintiff for making complaints,

stating, "All the crying you're doing to your mommy, some state representatives and to Camp Hill means nothing because . . . you're under my watch." (*Id.*) Plaintiff asked about his missing written materials and Dohman responded that he would have to hold on to them for investigative purposes. (*Id.* at 4.I-J, ¶ 64.)

On January 28, 2004, plaintiff received a reply from DiGuglielmo, stating that Lorenzo would be responsible for reviewing plaintiff's allegations. (*Id.* at 4.J, ¶ 68.) Plaintiff sent letters to various DOC officials, including defendants Beard, Williamson, DiGuglielmo and Lorenzo, detailing the course of events that had transpired. (*Id.* at 4.J, ¶ 69.) In those letters, he made clear that he believed retaliatory actions were being taken against him for exercising his constitutional rights. (*Id.*) At a PRC hearing the same day, the hearing official suggested plaintiff stop contacting outside people concerning the situation. (*Id.* at 4.K, ¶ 70.) On January 28, plaintiff also received a grievance rejection form from Hatcher, rejecting plaintiff's first grievance.[4] (*Id.* at 4.K, ¶ 71.)

On January 29, plaintiff received a response from Hatcher to his third grievance, stating, "Deputy Lorenzo, Property, Due 2/10/04." (*Id.* at 4.K, ¶ 73.) On that same day, plaintiff wrote to DiGuglielmo and Hatcher requesting that Lorenzo not be permitted to review his claims as Lorenzo's actions were, in part, the basis of his complaint. (*Id.* at 4.K, ¶¶ 72, 74.) Plaintiff received an initial grievance response from Lorenzo on January 31, stating that plaintiff's property had been confiscated because it appeared plaintiff was attempting to pass items to another inmate in the RHU unit. (*Id.* at 4.K-L, ¶ 75.) Lorenzo admitted that plaintiff's personal

[4]It appears that this rejection was to plaintiff's grievance of November 27, 2003, as prison officials otherwise disposed of plaintiff's other two reported grievances.

letters had been confiscated, but denied that any books had been taken. (*Id.* at 4.L, ¶ 75.) Lorenzo further concluded that plaintiff's allegations of retaliation were unfounded. (*Id.*)

On January 31, plaintiff received a letter from Lorenzo wherein he advised plaintiff as to the reasons he would be kept in administrative custody. (*Id.* at 4.L, ¶ 76.) Lorenzo stated that, after reviewing all the information, he had determined that sufficient justification existed to keep plaintiff in administrative custody and to initiate a transfer petition to place plaintiff in another institution. (*Id.*) Lorenzo explained his findings were based on confidential evidence concerning plaintiff's fraternization with a current and former staff member. (*Id.*) Further, plaintiff's "perception of harassment was in fact [Dohman] doing his job in following up on complaints against [plaintiff] and allegations of fraternization." (*Id.*) Plaintiff sent an appeal of Lorenzo's letter to DiGuglielmo on February 2 contesting the decision, copied to other DOC officials, including defendants Beard and Williamson, and state representatives. (*Id.* at 4.L-M, ¶ 77.) Plaintiff followed up with DiGuglielmo on February 9 and received a response from DiGuglielmo stating, "I have spoken to Deputy Lorenzo [about] your situation. He summarized the information he has and I do believe he is objective about all of this. I am not going to reverse [the] recommendation made by the Security Department." (*Id.* at 4.L-M, ¶ 80.) Plaintiff also received responses from some of the DOC personnel to whom he had directed complaints, which advised plaintiff to utilize the DOC grievance system. (*Id.* at 4.M, 4.N ¶¶ 78, 81, 85.) On February 13, plaintiff appealed DiGuglielmo's affirmance of Lorenzo's determination. (*Id.* at 4.N, ¶ 84.)

On February 13, 2004, plaintiff was transferred to SCID. (*Id.* at 4.N, ¶ 83.) He received notice on February 22 from defendant Bitner that his letter appealing his administrative custody

of January 28, 2004 was dismissed as moot. (*Id.* at 4.N, ¶ 86.) The notice also reported that his transfer to SCID was not an issue appealable to final review. (*Id.*) Plaintiff continued to follow up on these issues, contesting the dismissal and rejection of his numerous complaints. (*Id.* at 4.N-P, ¶¶ 87, 88.) On March 15, 2004, plaintiff sent another grievance to Hatcher ("plaintiff's fourth grievance"), this time because some of his property was missing from that shipped to him at SCID (*id.* at 4.P, ¶ 90); he followed up on April 4, 2004 (*id.* at 4.Q, ¶ 93). On March 17, 2004, plaintiff received grievance correspondence regarding plaintiff's appeal of his second grievance, requesting photocopies of various documents related to his grievance. (*Id.* at 4.P, ¶ 90.) Because he had failed to include the appropriate documents, his appeal was later reported as having been dismissed. (*Id*. at 4.Q, ¶ 94.) Plaintiff attempted to respond, explaining why he did not have the proper documentation and his confusion regarding the requested documents. (*Id.* at 4.Q-R, ¶¶ 93, 95, 96.) He then wrote to various DOC officials, including all defendants, except defendant Bitner, that none of his concerns had been addressed and he would seek further relief. (*Id.* at 4.R, ¶ 97.)

B. Plaintiff's Claims

Plaintiff brings the instant action pursuant to § 1983 alleging that various prison officials effected deprivations of plaintiff's constitutional rights under the First, Fifth, Eighth and Fourteenth Amendments, based on prison officials' retaliation against him for exercising those rights. (Pl.'s Compl. at 4.S.) Plaintiff appears to allege two separate reasons for which he was retaliated against by SCIG officials: refusing to participate actively in an internal prison sting operation against prison officials and making numerous grievances and complaints. As a way of

relief, plaintiff requests: 1) a declaratory judgment that defendants' acts violated plaintiff's constitutional rights protected by the United States and Pennsylvania Constitutions; 2) defendants remove from plaintiff's prison files all false and fabricated information relating to the above-described events; 3) prison officials be prohibited from placing new false and fabricated information in plaintiff's prison file; 4) prison officials be prohibited from harassing or otherwise retaliating against plaintiff, or any witnesses he may eventually call in his defense, including the transfer of plaintiff to an institution even farther away from his home; 5) defendants allow plaintiff to engage in written and oral communication reasonably related to the conduct of this suit; 6) transfer back to SCIG; 7) reinstatement as an institutional plumber; 8) reinstatement to a promotional single cell; 9) reimbursement for the shipment of plaintiff's property to SCID in the amount of $28.58; 10) reimbursement for the loss of work from the time plaintiff was placed in the RHU at SCIG through the time plaintiff attained the comparable pay rate as an institutional plumber at SCID, which amounts to forty-two cents per hour, at six and one-half hours per day;[5] 11) damages in the amount of $250.00 per day for the time confined in the RHU at SCIG, November 27, 2003 through February 13, 2004 (seventy-nine days); 12) compensatory damages in the amount of $5,000.00 from defendants;[6] 13) punitive damages in the amount of $15,000.00 from defendants Lorenzo and Dohman; and 14) attorney fees and costs.

[5]Plaintiff does not reveal the date when he became an institutional plumber at SCID.

[6]It is not clear whether plaintiff seeks $5,000 from each defendant, or defendants collectively.

II. Discussion

A. Standard

A motion to dismiss under Federal Rule Civil Procedure 12(b)(6) tests the sufficiency of a complaint. *Johnsrud v. Carter*, 620 F.2d 29, 33 (3d Cir. 1980) (citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957)). In evaluating a motion to dismiss, all allegations in the complaint and all reasonable inferences that can be drawn therefrom must be accepted as true and viewed in the light most favorable to the non-moving party. *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989) (citing *Wisniewski v. Johns-Manville Corp.*, 759 F.2d 271, 273 (3d Cir. 1985)). The court may dismiss a complaint, "only if it is certain that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Swin Res. Sys., Inc. v. Lycoming County*, 883 F.2d 245, 247 (3d Cir. 1989) (citing *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

"A *pro se* complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers' and can only be dismissed for failure to state a claim if it appears 'beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Estelle v. Gamble*, 429 U.S. 97, 106 (1976) (quoting from *Haines v. Kerner*, 404 U.S. 519 (1972)).

B. Statute of Limitations

Defendants first assert that to the extent plaintiff's claims are based on events that took place before January 13, 2004, such claims are barred by the applicable two-year statute of limitations. (Def.'s Mot. at 9; Def.'s Reply to Pl.'s Opp'n at 1.) Defendants argue that plaintiff's

claim accrued when he first learned that Dohman intended to take adverse action against him, on August 3, 2003, when Dohman denied Renee Robinson's visiting privileges. (Def.'s Mot. at 10.) Because the two-year statute began to run on that date, and plaintiff did not file the instant action until January 13, 2006,[7] his claims are therefore time-barred and should be dismissed. (*Id.*) Defendants submit the statute of limitations applicable to a § 1983 action must be tolled while an inmate exhausts his administrative remedies, but argue tolling is inapplicable to plaintiff because he did not first exhaust his administrative remedies. (Def.'s Reply to Pl.'s Opp'n at 2.) Defendants aver that plaintiff did not file his first grievance in the allotted fifteen days, as per DC-ADM 804, Part VI.A.8, thus he cannot avail himself of equitable tolling. (*Id.* at 2-3.)

Plaintiff lodges several responses, primarily centered on his right to equitable tolling. Plaintiff argues that because the Prison Litigation Reform Act ("PLRA") requires prisoners to exhaust administrative remedies before they have a right to bring suit in federal court, the two-year period could not have begun until that right arose, which was not until well into 2004. (Pl.'s Opp'n. at 7-8.) He contends his administrative remedies under DC-ADM 804 did not become exhausted until they were dismissed by Sharon M. Burks, Chief Grievance Officer, on March 30, 2004 (*id.* at 2) and his administrative remedies under DC-ADM 802 were not exhausted until the final administrative review decision rendered by Robert S. Bitner, Chief Hearing Officer, on February 22, 2004 (*id.* at 3). Thus, plaintiff's claims should be tolled through March 30, 2004.

Next, plaintiff asserts that his complaint alleges not just one event, but a series of events

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[7]The clerk received plaintiff's complaint on January 13, 2006, but plaintiff's signature on the complaint was dated January 6, 2005. For *pro se* motions, the motion is considered to have been filed when the prisoner puts it into the prison mail system, regardless of when the district court clerk actually receives it. *Burns v. Morton*, 134 F.3d 109, 113 (3d Cir. 1998).

culminating in his transfer from SCIG to SCID, hence a number of accrual dates based on a variety of constitutional violations are relevant. (Pl.'s Opp'n at 4.) Further, if the statute of limitations began to run on any particular date, plaintiff argues it would be on February 13, 2004, when plaintiff was transferred, because that is when he discovered his injury. (*Id.* at 8.) In any event, plaintiff asserts that this would be a question of fact not suitable for resolution at this juncture. (*Id.*) Lastly, plaintiff contests defendants' motion by claiming they have placed him in the position of having to plead and prove exhaustion, which he contends is an affirmative defense. (Pl.'s Supp. Br. in Opp'n at 3.) He maintains that he has more than adequately pleaded his "substantial compliance" with the inmate grievance system, which is all that is required. (*Id.* at 5-6.) Because plaintiff's claims are subject to tolling pursuant to the PLRA, and also because plaintiff has alleged an ongoing violation, part of which occurred during the limitations period, I will deny defendants' motion to dismiss based on the applicable statute of limitations.

"Technically, the Federal Rules of Civil Procedure require that affirmative defenses be pleaded in the answer. Rule 12(b) states that 'every defense . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion . . . .'" *Robinson v. Johnson*, 313 F.3d 128, 135 (3d Cir. 2002). Federal Rule of Civil Procedure 12(b) does not include a limitations defense. Fed. R. Civ. P. 12(b). Thus, a limitations defense must be raised in the answer, since Rule 12(b) does not permit it to be raised by motion. *See id.*; *Robinson*, 313 F.3d at 135. "However, the law of this Circuit (the so-called 'Third Circuit Rule') permits a limitations defense to be raised by a motion under Rule 12(b)(6), but only if 'the time alleged in the statement of a claim shows that the cause of action has not been brought within the statute of limitations.'" *Robinson*, 313 F.3d. at 135

(citing *Hanna v. U.S. Veterans' Admin. Hosp.*, 514 F.2d 1092, 1094 (3d Cir. 1975)). "If the bar is not apparent on the face of the complaint, then it may not afford the basis for a dismissal of the complaint under Rule 12(b)(6)." *Robinson*, 313 F.3d at 135 (citing *Bethel v. Jendoco Constr. Corp.*, 570 F.2d 1168, 1174 (3d Cir. 1978)).

For all claims brought under § 1983, federal courts apply the state's statute of limitations for personal injury actions. *See Sameric Corp. of Del., Inc. v. City of Philadelphia*, 142 F.3d 582, 599-600 (3d Cir. 1998). Pennsylvania's two-year statute of limitations for personal injury, *see* 42 Pa. Cons. Stat. § 5524, therefore governs plaintiff's claims under § 1983. Federal law, however, still governs when a § 1983 action accrues, *Montgomery v. DeSimone*, 159 F.3d 120, 126 (3d Cir. 1998), under which "the limitations period begins to run from the time when the plaintiff knows or has reason to know of the injury which is the basis for the section 1983 action." *Genty v. Resolution Trust Corp.*, 937 F.2d 899, 919 (3d Cir. 1991).

Section 1997e(a) of the PLRA requires exhaustion of administrative remedies before a prisoner can file suit under any federal law with respect to prison conditions. *See Booth v. Churner*, 532 U.S. 731, 739 (2001) (stating that exhaustion under § 1997e(a) is mandatory). Section 1997e(a) provides as follows: "No action shall be brought with respect to prison conditions under [§] 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Various courts of appeals, as well as district courts in the Third Circuit, have concluded that the statute of limitations applicable to a § 1983 claim must be tolled while an inmate exhausts his administrative remedies in accordance with the PLRA. *See Brown v. Valoff*, 422 F.3d 926, 942-43 (9th Cir. 2005); *Jones v. Rivera*, 272 F.3d 519, 522 (7th

Cir. 2001); *Brown v. Morgan*, 209 F.3d 595, 596 (6th Cir. 2000); *Harris v. Hegmann*, 198 F.3d 153, 157-59 (5th Cir. 1999); *Jackson v. Baddick*, 2004 U.S. Dist. LEXIS 15154, at *34 (E.D. Pa. 2004) (stating that the "statute of limitations was tolled while Plaintiff exhausted his administrative remedies"). *Howard v. Mendez*, 304 F. Supp. 2d 632, 638 (M.D. Pa. 2004) (citing 42 Pa. Cons. Stat. § 5535(b), "the commencement of a civil action or proceeding has been stayed by a court or by statutory prohibition, the duration of the stay is not a part of the time within which the action or proceeding must be commenced"). Because an inmate would be placed in a situation where his suit would either be barred from federal court for failure to exhaust administrative remedies under the PLRA, or time-barred because he had pursued those administrative remedies, I will follow the Fifth, Sixth, Seventh and Ninth Circuits by holding that the statute of limitations for an inmate's § 1983 claims are tolled while he exhausts his administrative remedies.[8]

Defendants argue that even though the statute of limitations may be equitably tolled while an inmate pursues administrative remedies as mandated by the PLRA, plaintiff in this case has failed to exhaust his administrative remedies in a proper manner, thus he cannot avail himself of equitable tolling. (Def.'s Reply to Pl.'s Opp'n at 2.) Consequently, the standard for exhaustion becomes relevant to determining whether plaintiff's claims are barred by the statute of limitations.[9] Defendants' one contention is that plaintiff first discovered the possible First

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[8]Defendants do not contest this conclusion, but rather argue that plaintiff's claims are ineligible for equitable tolling. (Def.'s Reply to Pl.'s Opp'n at 2.)

[9]Plaintiff rightly points out that proper exhaustion of remedies is ordinarily an affirmative defense to be pleaded and proved by the defendant. (Pl.'s Supp. Br. in Opp'n at 3); *see Ahmed v. Dragovich*, 297 F.3d 201, 209 (3d Cir. 2002). However, the failure to exhaust may also be raised as a basis for a motion to dismiss, in appropriate cases. *Brown v. Croak*, 312 F.3d 109, 111 (3d.

Amendment claim on August 3, 2003, but did not file the proper inmate grievance until November 27, 2003, more than the fifteen days mandated by the relevant DOC policy. (*Id.* at 2-3.) Plaintiff counters that other relevant DOC policy encourages the resolution of problems by informal means–which he did–and, moreover, he submitted a written grievance to DiGuglielmo on November 2, asking that it be treated as a formal written grievance, to be reviewed by DiGuglielmo, given plaintiff's concern that Lorenzo would review any grievance submitted to Hatcher. (Pl.'s Supp. Br. in Opp'n at 2-4.)

"The Third Circuit has concluded that it is beyond the power of this court to excuse compliance with the exhaustion requirement. However, notwithstanding the bright-line rule requiring exhaustion, compliance with the administrative remedy scheme will be satisfactory if substantial." *Thomas v. Zinkel*, 155 F. Supp. 2d 408, 413 (E.D. Pa. 2001) (citing *Nyhuis v. Reno*, 204 F.3d 65, 73 (3d Cir. 2000)); *see also Spruill v. Gillis*, 372 F.3d 218, 232 (3d Cir. 2004) (leaving unresolved at what point compliance with prison grievance procedures is deemed sufficiently "substantial" to excuse procedural default); *Ahmed*, 297 F.3d at 209 (stating "whatever the parameters of 'substantial compliance' referred to [in *Nyhuis*, 204 F.3d at 77-78], it does not encompass a second-step appeal five months late"). For purposes of a motion to dismiss, I must take all plaintiff's allegations to be true, and it cannot be said that plaintiff's complaint "shows that the cause of action has not been brought within the statute of limitations," as plaintiff contends he has substantially complied with the inmate grievance system, thereby tolling the statute of limitations. (Pl.'s Supp. Br. in Opp'n at 3); *see Robinson*, 313 F.3d. at 135.

Cir. 2002).

Nothing on the face of plaintiff's complaint suggests that he did not substantially comply with the applicable procedures. Consequently, defendants' motion must be denied at this stage. This decision does not preclude defendants from raising the expiration of the statute of limitations or failure to exhaust as affirmative defenses and conducting discovery into the relevant circumstances.

Notwithstanding the eligibility of plaintiff's claims for tolling, it is also not clear from the face of the complaint when plaintiff's claim accrued. Generally, a claim accrues in a federal cause of action "as soon as a potential claimant either is aware, or should be aware, of the existence of and source of injury, not when the potential claimant knows or should know that the injury constitutes a legal wrong." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1386 (3d Cir. 1994). A plaintiff does not need to possess all of the facts necessary to state a cause of action; rather, a plaintiff need only have sufficient notice to alert him or her of the need to begin investigating. *Abbdulaziz v. City of Philadelphia*, 2001 U.S. Dist. LEXIS 16972, at *17 (E.D. Pa. Oct. 18, 2001) (citing *Zeleznik v. United States*, 770 F.2d 20, 22-23 (3d Cir. 1985)). Defendants allege that plaintiff was put on notice as early as August 3, 2003 that Dohman intended to take action against him by denying Robinson's visiting privileges. (Def.'s Mot. at 10.) However, plaintiff has alleged a series of constitutional violations with a variety of accrual dates. (Pl.'s Opp'n at 4, 6.) The Third Circuit has stated, "In most federal causes of action, when a defendant's conduct is part of a continuing practice, an action is timely so long as the last act evidencing the continuous practice falls within the limitations period; in such an instance, the court will grant relief for the earlier related acts that would otherwise be time barred." *Brenner v. Local 514, United Bhd. of Carpenters*, 927 F.2d 1283, 1295 (3d Cir. 1991) (citing *Keystone Ins.*

Co. v. Houghton, 863 F.2d 1125, 1129 (3d Cir. 1988)); *see also Wesley v. Vaughn*, 1999 U.S. Dist. LEXIS 18098, at **10-11 (E.D. Pa. Nov. 18, 1999) (applying the continuing violation doctrine to an inmate's allegations of prison officials' ongoing practice, thereby invoking equitable tolling and including all violations in the limitations period). "A plaintiff must establish that the defendant's conduct is more than the occurrence of isolated or sporadic acts." *Cowell v. Palmer Twp.*, 263 F.3d 286, 292 (3d Cir. 2001). The Third Circuit has directed the court to consider three factors: (1) subject matter, (2) frequency, and (3) degree of permanence. *Id.*

Plaintiff alleges that defendants violated his First, Fifth, Eighth and Fourteenth Amendment rights by a series of events over several months, culminating in his transfer to SCID. (Pl.'s Compl. at 4.S.) All of these events were related to Dohman's request for plaintiff to participate in a sting operation and plaintiff's refusal and subsequent complaints. Because some of these actions took place after January 13, 2004 (or January 6, 2004)–specifically plaintiff's transfer to SCID–plaintiff may properly bring his claims as they are not barred by the statute of limitations. Therefore, I will deny defendants' motion to dismiss for failure to state a claim based on plaintiff's failure to bring his claim within the statute of limitations.

C. Retaliation Claims

Plaintiff alleges that DOC officials engaged in a pattern of conduct aimed at retaliating against him for exercising his constitutionally protected right to petition the government for redress of grievances and his constitutional right not to participate actively in a proposed internal sting operation. He argues that DOC officials violated his First, Fifth, Eighth and Fourteenth

Amendment rights.[10] Plaintiff's complaint catalogs numerous allegedly retaliatory actions taken against him, including being placed in the RHU, having his property seized multiple times, and ultimately, his transfer to SCID.

To state an actionable claim for retaliation, a prisoner-plaintiff must prove that (1) the conduct which led to the alleged retaliation was constitutionally protected; (2) he suffered some adverse action that was sufficient to deter a person of ordinary firmness from exercising his constitutional rights; and (3) the constitutionally protected conduct was a substantial or motivating factor in the decision to take adverse action. *Rauser v. Horn*, 241 F.3d 330, 333 (3d Cir. 2001).

First Element: Constitutionally Protected Activity

Plaintiff in this case asserts he was retaliated against by prison officials for filing multiple grievances within the prison system and writing letters to various DOC and state officials, and also for refusing to participate actively in an internal sting operation against corrupt prison officials. Because plaintiff as a state prisoner has a right under the First and Fourteenth Amendments to petition the government for redress of grievances and to enjoy free access to the courts, *Milhouse v. Carlson*, 652 F.2d 371, 373-74 (3d Cir. 1981), his initial allegation meets the first element of a cause of action for retaliation.

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[10]Defendants contend that plaintiff did not assert claims under the Fifth, Eighth or Fourteenth Amendments in his civil action, only in his briefs in opposition to their motion. (Def.'s Reply to Pl.'s Opp'n at 4 n.2.) However, this assertion is inaccurate as plaintiff clearly states on page 4.S of his complaint that his First, Fifth, Eighth and Fourteenth Amendment rights were violated by "Dohman along with officials[']malfeasance up the chain of command." (Pl.'s Compl. at 4.S.) Plaintiff significantly explains and clarifies these claims in his later briefs.

Plaintiff also has the right not to participate in an internal sting operation under the Eighth Amendment. Plaintiff asserts, among other things, that he has an Eighth Amendment right not to be labeled a prison informant as "he faced very real and likely risk of retaliation by other prisoners and guards who would eventually learn that plaintiff had become a 'rat' (informant)[] for...Dohman...The plaintiff also faced being 'snitch-jacketed'[11] by other members of the prison security, other uniformed personnel, and/or other prisoners." Defendants maintain a prisoner has no right to refuse to cooperate in an internal prison investigation and, therefore, because there is no "protected activity," plaintiff's claim as to retaliation for his refusal to cooperate must fail. (Def.'s Reply to Pl.'s Opp'n at 3-4.) Thus, defendants also imply the converse: prison officials may constitutionally require plaintiff to participate actively in a prison sting operation. Whether this proposition is accurate would appear to be of first impression in the Third Circuit. Defendants cite *Knox v. Wainscott*, 2003 U.S. Dist. LEXIS 13785, **20-21 (N.D. Ill. May 14, 2003) in support (Def.'s Mot. at 14; Def.'s Reply to Pl.'s Opp'n at 4), but that case is of limited persuasiveness and distinguishable from the instant facts. In *Knox*, the inmate alleged numerous constitutional violations stemming from alleged brutal treatment by prison officials and the lack of adequate medical care. *Id.* at **2-3. The court found Count 2 of the inmate's complaint alleged a great number of constitutional violations that were independently actionable, but failed "to set forth a chronology of events from which retaliation [could] be inferred...[as he] did not allege that he was punished for engaging in protected activity." *Id.* at **18-21. Rather, the inmate claimed "that the defendants lashed out at him on account of his suspected involvement in

[11]Labeled as a prison or police informant. *See Amrine v. Bowersox*, 128 F.3d 1222, 1224 (8th Cir. 1997); *People v. Martinez*, 106 Cal. App. 3d 524, 530 (Cal. Ct. App. 1980).

[and refusal to cooperate in the investigation of] the loss or theft of an officer's keys and handcuffs." *Id.* (alteration in original). The inmate had been implicated in the items' disappearance, ordered to permit a search of his cell and person, and physically assaulted when questioned about the items' disappearance. *Id.* at **3-4. While that inmate and the plaintiff here were both asked to cooperate in a prison investigation, here plaintiff was not suspected of involvement in any wrongdoing. Rather than just being asked questions about a prior event, here, plaintiff was requested to assist affirmatively prison officials in the investigation of allegedly corrupt prison guards by participating in a sting operation. Plaintiff also alleges a chronology of events from which retaliation could be inferred based on his refusal to participate in this sting operation.

In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court held "a prison official may be held liable under the Eighth Amendment for denying humane conditions of confinement only if he knows that inmate faces a substantial risk of serious harm and disregards that risk by failing to take reasonable measures to abate it." *Farmer*, 511 U.S. at 847. "In particular, as the lower courts have uniformly held, and as [the Supreme Court has] assumed, 'prison officials have a duty . . . to protect prisoners from violence at the hands of other prisoners.'" *Id*. at 833 (citations omitted). Courts have recognized "that being branded a 'snitch' may have serious consequences to an inmate's health." *Tillery v. Owens*, 719 F. Supp. 1256, 1276-77 (W.D. Pa. 1989); *see also Blizzard v. Hastings*, 886 F. Supp. 405, 410 (D. Del. 1995) (stating that being labeled a snitch "can put a prisoner at risk of being injured"). Courts have also held that a correction officer's labeling a prisoner a snitch constitutes an Eighth Amendment violation. *See, e.g.*, *Northington v. Jackson*, 973 F.2d 1518, 1525 (10th Cir. 1992) (overturning Rule 12(b)(6)

dismissal of complaint alleging that prisoner was beaten by inmates because a guard told them the prisoner was a "snitch;" allegation that guard intended harm to prisoner by inciting other prisoners to beat him states a claim); *Miller v. Leathers*, 913 F.2d 1085, 1088 n.* (4th Cir. 1990) (stating, "[i]t is impossible to minimize the possible consequences to a prisoner of being labelled [sic] a 'snitch,'" in support of prisoner's retaliation claim); *Valandingham v. Bojorquez*, 866 F.2d 1135, 1139 (9th Cir. 1989) (reversing grant of summary judgment for defendants because "whether [the guards] called [a prisoner] a 'snitch' in the presence of other inmates is 'material' to a section 1983 claim for denial of the right not to be subjected to physical harm by employees of the state acting under color of law"); *Harmon v. Berry*, 728 F.2d 1407, 1409 (11th Cir. 1984) (reversing the district court's dismissal as frivolous of prisoner's claim that "prison officials have labeled him a snitch and are exposing him to inmate retaliation"); *Watson v. McGinnis*, 964 F. Supp. 127, 132 (S.D.N.Y. 1997) (holding that guard's intentionally calling a prisoner a snitch in order to cause him harm by other inmates states an Eighth Amendment excessive force claim); *Hendrickson v. Emergency Med. Serv.'s*, 1996 U.S. Dist. LEXIS 13561, at *18 (E.D. Pa. Aug. 20, 1996) (denying defendants' summary judgment motion because of factual issue as to whether a guard called prisoner a snitch in front of other inmates); *Thomas v. District of Columbia*, 887 F. Supp. 1, 4 (D.D.C. 1995) (concluding that being "physically confronted by and threatened by inmates" after a guard started a rumor that prisoner was a snitch was "sufficiently harmful to make out an Eighth Amendment excessive force claim;" "in the prison context . . . one can think of few acts that could be more likely to lead to physical injury [to an inmate] than spreading rumors of . . . informing").

Because being labeled a snitch could place an inmate's life in danger, it follows that an

inmate's refusal to become one is protected. Other courts have reached this conclusion, or assumed it without deciding. *Allah v. Juchenwioz*, 1999 U.S. Dist. LEXIS 11739, at *9 (S.D.N.Y. July 30, 1999) (holding that the inmate's claimed conduct–his refusal to snitch when asked in the presence of other inmates–is protected);[12] *Jackson v. Johnson*, 15 F. Supp. 2d 341, 364 (S.D.N.Y. 1998) (assuming, without deciding, that an inmate has a constitutional right not to snitch, thereby finding that the plaintiff had satisfied the first prong of the test for retaliation); *David v. Hill*, 401 F. Supp. 2d 749, 757 (S.D. Tex. 2005) (assuming without deciding that plaintiff has a constitutional right not to participate in a prison investigation). Prison officials may not constitutionally require an inmate to participate actively in a sting operation against corrupt prison guards. If inmates have a constitutional right not to be labeled a "snitch," plaintiff's refusal to become one by participating in an internal sting operation is certainly constitutionally protected activity.

Second Element: Adverse Action

To establish the second element, a prisoner-plaintiff need not allege that the adverse action he suffered and on which his claim is based involved the violation of a constitutional right. "Government actions, which standing alone do not violate the Constitution, may nonetheless be constitutional torts if motivated in substantial part by a desire to punish an individual for the

[12]The action was dismissed on qualified immunity grounds by *Allah v. Juchenwioz*, 2004 U.S. Dist. LEXIS 21482, at *6 (S.D.N.Y. Oct. 26, 2004). The Second Circuit affirmed the dismissal assuming, without deciding, that an inmate has a constitutional right not to become an informant, but even if such a right existed, it was not clearly established at the time when the challenged conduct occurred. *Allah v. Juchenwioz*, 176 F.App'x. 187, 189 (2d Cir. 2006) (non-precedential).

protection of a constitutional right." *Mitchell v. Horn*, 318 F.3d 523, 530 (3d Cir. 2003). Adverse government actions that have been deemed sufficient to support a retaliation claim include filing false misconduct reports against a prisoner, *see Smith v. Mensinger*, 293 F.3d 641 (3d Cir. 2002); detaining a prisoner in administrative segregation, *see Allah v. Seiverling*, 229 F.3d 220 (3d Cir. 2000); denying a prisoner parole, *see Rauser*, 241 F.3d at 333; transferring a prisoner to a distant prison, *see id.*; reducing a prisoner's wages, *see id.*; placing a prisoner lower on a promotion ranking list, *see Suppan v. Dadonna*, 203 F.3d 228 (3d Cir. 2000); and transferring a prisoner from a single to a double cell, *see Pratt v. Rowland*, 65 F.3d 802 (9th Cir. 1995) (cited by the Third Circuit with approval in *Allah*, 229 F.3d at 225).

Plaintiff has alleged adverse actions sufficient to establish the second element of the retaliation claim as to both bases for his retaliation claim. As described above, plaintiff alleges that he was placed in RHU, had his property seized, and was ultimately transferred to another prison. While plaintiff may not ultimately be able to prove that the adverse actions alleged in his complaint would have deterred a person of ordinary firmness from exercising his constitutional rights, guided by existing Third Circuit case law establishing what is minimally required to satisfy the element of adverse action in a retaliation case, the court must accept the allegations as true for purposes of this motion and they do constitute adverse actions.

Third Element: Causation

The third element of the prima facie retaliation case is causation. For purposes of establishing causation, evidence of "suggestive temporal proximity" is relevant. *Rauser*, 241 F.3d at 334. The Third Circuit has held that the mere mention of the word "retaliation" in a

prisoner's *pro se* complaint "sufficiently implie[d] a causal link" between the prisoner's complaints and the misconduct charges filed against him to survive *sua sponte*dismissal by the district court. *Mitchell*, 318 F.3d at 530.

Here, plaintiff expressly alleges that the adverse actions taken against him were because of his refusal to participate in an internal sting investigation and his frequent complaints and filing of administrative grievances. Plaintiff alleges that defendant Dohman made direct and unambiguous statements linking his adverse actions to plaintiff's refusal to participate in this sting operation and plaintiff's frequent use of the grievance process and written complaints to others. He also alleges statements by other prison officials, including defendant Lorenzo, who corroborate Dohman's purpose. Plaintiff likewise alleges a chronology of events that additionally raises sufficient circumstantial evidence to establish causation.

Given that plaintiff has satisfied the elements of a claim for retaliation, defendants' motion to dismiss the retaliation claims must be denied.[13]

D. Personal Involvement Requirement of Section 1983

Defendants argue that plaintiff's § 1983 claims against defendants Beard, Burks, Bitner, Williamson, DiGuglielmo and Hatcher must be dismissed because plaintiff does not allege personal wrongdoing on the part of any of these defendants, as required by § 1983. To state a

[13]The court takes no position on whether the prison officials may still prevail on the issue of retaliation if they can prove by a preponderance of the evidence they would have taken the same actions, absent the protected conduct, for reasons reasonably related to a legitimate penological interest or interests. *See Carter v. Dragovich*, 292 F.3d 152, 159 (3d Cir. 2002).

claim under § 1983, a plaintiff must show that the defendant state official(s) were personally involved in constitutional wrongdoing. *Rode v. Dellarciprete*, 845 F.2d 1195, 1207 (3d Cir. 1988). This can be accomplished in two ways: through allegations of personal direction or of actual knowledge and acquiescence; liability cannot be predicated solely on the operation of *respondeat superior*. *Id.* "Allegations of participation or actual knowledge and acquiescence, however, must be made with appropriate particularity." *Id.*

A thorough review of plaintiff's complaint–and a liberal construction thereof–reveals that allegations of either direct constitutional wrongdoing or knowledge of and acquiescence in such wrongdoing are made against all of the above-named defendants, excepting Bitner and Burks. Plaintiff alleges that he spoke with or wrote letters to defendants Hatcher, DiGuglielmo, Williamson and Beard documenting his refusal to participate in the internal sting investigation and subsequent retaliation. *See Atkinson v. Taylor*, 316 F.3d 257, 270 (3d Cir. 2003) (noting district court's conclusion that there was sufficient evidence that inmate either wrote or spoke to each supervisory defendant regarding both his exposure to environmental tobacco smoke and the retaliatory harassment by a particular prison official). Plaintiff also provides statements by other prison officials evidencing the knowledge and involvement of "higher ups" who allegedly condoned Dohman and Lorenzo's actions. Allegations against some defendants are more factually specific than those against others, and many of the allegations appear to be rather tenuous, but it is not for the court at this point to make judgments about the credibility of plaintiff's allegations or his ability to substantiate them subsequently.

Plaintiff alleges that Bitner and Burks were made aware of plaintiff's situation in their capacities as Chief Hearing Examiner and Chief Grievance Officer, respectively, and dismissed

his claims on procedural grounds. Plaintiff does not allege that Bitner or Burks had contemporaneous knowledge of any constitutional wrongdoing such that it would be possible for either of them to acquiesce in the alleged unlawful conduct. While plaintiff alleges he kept the other defendants apprised of the alleged ongoing constitutional violations, with respect to defendant Bitner plaintiff states he received a notice from Bitner on February 22, 2004, dismissing his appeal of confinement to the RHU as moot, and with respect to defendant Burks plaintiff states he first received grievance correspondence from her on March 17, 2004, a document that is not in the record. These communications occurred after all of the adverse actions plaintiff alleges had already taken place, thus neither Bitner nor Burks could have acted to stop any of the constitutional wrongdoing. *See Evancho v. Fisher*, 423 F.3d 347, 353 (3d Cir. 2005) (dismissing plaintiff's complaint as it "[did] not contain even a remote suggestion that [defendant supervisory official] had contemporaneous, personal knowledge of [plaintiff's] transfer and acquiesced in it"); *cf. Robinson v. City of Pittsburgh*, 120 F.3d 1286, 1294 (3d Cir. 1997) ("Where a supervisor with authority over a subordinate knows that the subordinate is violating someone's rights but fails to act to stop the subordinate from doing so, the factfinder may usually infer that the supervisor 'acquiesced' in. . . the. . . conduct."). Moreover, both Bitner and Burks dismissed plaintiff's claims on procedural, rather than any substantive, grounds.[14]

[14]Defendant Bitner dismissed plaintiff's appeal of administrative custody status as moot because plaintiff had been released from administrative custody upon transfer to SCID. (Attach. B of Pl.'s Opp'n; Compl. at 4.N, ¶ 86.) Defendant Burks' letter dismissing plaintiff's appeal, dated March 30, 2004, states that plaintiff's appeal was dismissed for failure "to include [plaintiff's] initial grievance, the initial response and the superintendent's response." (Attach. A of Pl.'s Opp'n; Compl. at 4.Q, ¶ 94.) It also states that plaintiff had been warned in the last correspondence that his appeal would be dismissed if the proper documents were not received. (Attach. A of Pl.'s Opp'n.)

Because plaintiff fails to allege personal involvement in constitutional wrongdoing on the part Bitner or Burks, and because such personal involvement is a necessary element of a § 1983 claim, plaintiff fails to state any valid claims against Bitner or Burks. Accordingly, defendants' motion to dismiss defendants as parties for lack of personal involvement in constitutional wrongdoing is granted as to those two parties, but denied as to the remaining individual defendants.

E. Qualified Immunity

Government officials, performing discretionary functions, are entitled to qualified immunity for their actions, if their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Qualified immunity is an affirmative defense that the officer must raise. *See Siegert v. Gilley*, 500 U.S. 226, 231 (1991). Because the Supreme Court characterizes the issue of qualified immunity as a question of law, *Elder v. Holloway*, 510 U.S. 510, 511 (1994),[15]

[15]Despite the Court's statement that qualified immunity questions are questions of law, the Third Circuit has noted that there is sometimes significant doubt as to the pure legal character of such questions. The Third Circuit has noted that the Court's imperative to decide qualified immunity issues early is in tension with the reality that factual disputes often need to be resolved before determining whether the defendant's conduct violated a clearly established constitutional right. *Curley v. Klem*, 298 F.3d 271, 278 (3d Cir. 2002). The Third Circuit has indicated that resolution of this question may be a fact-intensive inquiry that requires a careful examination of the record. *Grant v. City of Pittsburgh*, 98 F.3d 116, 122 (3d Cir. 1996). Such an examination should include a detailed factual description of the actions of each individual defendant. *Id*.

The lack of a sufficient record upon which to decide the qualified immunity issue is of particular concern in a motion to dismiss context. In *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992), the Third Circuit noted that the standard of review for a 12(b)(6) motion favors denying qualified immunity. *Id*. at 1462. "On review of a motion to dismiss for failure to state a claim, we look only to the complaint to see whether there is any set of facts plaintiff can prove that would support denial of immunity." *Kulwicki*, 969 F.2d at 1462.

the Court has repeatedly encouraged the resolution of immunity questions early in the proceedings. *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001); *Hunter v. Bryant*, 502 U.S. 224, 227 (1991) (*per curiam*); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987).

Whether or not defendants are entitled to qualified immunity from plaintiff's § 1983 action for damages will depend on whether they are able to show that their conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known. This requires a two-part analysis (the *Saucier* test): First, taken in the light most favorable to the party asserting the injury, do the facts alleged show that the defendant violated a constitutional right. *Saucier*, 533 U.S. at 201. Second, if the initial prong is satisfied, the court must determine whether that right was clearly established at the time of the alleged violation. *Id.* at 201-02; *Curley v. Klem*, 298 F.3d 271, 279-80 (3d Cir. 2002); *Grant v. City of Pittsburgh*, 98 F.3d 116, 121 (3d Cir. 1996) (citing *Anderson*, 483 U.S. at 636-37).

Plaintiff asserts he was retaliated against for filing numerous grievances and complaints to others outside the prison system, and for his refusal to participate actively in an internal sting operation. With respect to plaintiff's claim of retaliation for filing of grievances, the right implicated under the first prong of the *Saucier* test for qualified immunity is the First Amendment right of prisoners to petition the government for the redress of grievances, as discussed above relating to the protected activity element of a claim for retaliation. *See Milhouse v. Carlson*, 652 F.2d 371, 373-74 (3d Cir. 1981); *Abuhouran v. Acker*, 2005 U.S. Dist. LEXIS 12864, at **23-34 (E.D. Pa. June 29, 2005). The Third Circuit has held that a prisoner who alleged "that he was subjected to a series of conspiratorially planned disciplinary actions in retaliation for filing a civil rights suit against prison officials stated a cause of action for

infringement of the prisoner's First Amendment right." *Atkinson*, 316 F.3d at 270 (citing *Milhouse*, 652 F.2d at 373-74). Here, plaintiff states a similar claim, thus meeting the first part of the *Saucier* test by alleging a violation of a recognized constitutional right.

As to the second part of the *Saucier* inquiry, the Third Circuit has clearly established a prisoner's right to access the courts and right to petition the government for redress of grievances such that a reasonable prison official would know that he violates these rights if he retaliates against a prisoner for filing a lawsuit or filing grievances. *Atkinson*, 316 F.3d at 270. The retaliatory actions plaintiff alleges, if proven, are not legal. *See id.* Thus, *Saucier's* second prong is satisfied and defendants are not entitled to qualified immunity.

With respect to the plaintiff's retaliation claim for his refusal to participate in an internal sting operation, he meets the first prong of the *Saucier* inquiry as he has a right under the Eighth Amendment to refuse to so participate, but his claim for damages must be dismissed because it cannot be said that the right not to participate in an internal sting operation was clearly established at the time of defendants' alleged actions. Although a logical outgrowth of cases acknowledging the dangers of being labeled a prison informant, the paucity of cases addressing the constitutionality of requiring an inmate to participate in a sting operation evidences the fact that such a right cannot be said to have been clearly established at the time of defendants' actions. *See Allah*, 2004 U.S. Dist. LEXIS 21482, at *6. Therefore, I hold that defendants are entitled to qualified immunity on plaintiff's claim of retaliation for refusal to participate in an internal sting operation.

F. Sovereign Immunity as to the State Law Claim

Generally, the Commonwealth and its agencies, officials and employees acting within the scope of their duties are immune from suits for damages. *Faust v. Commonwealth*, 592 A.2d 835, 839-40 & n.6 (Pa. Commw. Ct. 1991) (citing 1 Pa. Cons. Stat. § 2310, which establishes immunity for officials and employees of the Commonwealth under Article I, Section 11 of the Pennsylvania Constitution). Damage suits will be barred unless the plaintiff establishes that the cause of action falls under one of the specifically enumerated legislative exceptions to immunity. *See* 42 Pa. Cons. Stat. § 8522. There are nine statutory exceptions where the General Assembly has waived the Commonwealth's sovereign immunity,[16] none of which is applicable in the instant action. *See id.*

"A 'Commonwealth party' entitled to immunity is defined as a Commonwealth agency and its employees with respect to acts within the scope of their employment. *Story v. Mechling*, 412 F. Supp. 2d 509, 519 (W.D. Pa. 2006) (citing 42 Pa. Cons. Stat. Ann. § 8501). In addition, "[s]overeign immunity bars monetary relief claims against state defendants acting in their individual capacity." *Mechling*, 412 F. Supp. 2d at 519 (citing *Maute v. Frank*, 657 A.2d 985, 986 (Pa. Super. Ct. 1995)). Plaintiff initially states that all defendants are being sued in both their individual and official capacities. (Compl. at 4.R.) However, immediately thereafter plaintiff states that defendants Beard and Williamson are sued exclusively in their official capacities. (*Id.*) That plaintiff has brought suit against some plaintiffs in their individual capacities does not change the application of sovereign immunity. However, in his opposition,

[16]These exceptions are: (1) vehicle liability; (2) medical-professional liability; (3) care, custody, or control of personal property; (4) Commonwealth real estate, highways, and sidewalks; (5) potholes and other dangerous road conditions; (6) care, custody, or control of animals; (7) liquor store sales; (8) National Guard activities; and (9) toxoids and vaccines. 42 Pa. Cons. Stat. § 8522.

plaintiff appears to assert that defendants Dohman and Lorenzo were acting outside the scope of their employment. (Pl.'s Opp'n at 34-35.) A Commonwealth employee is only protected by sovereign immunity for acting within the scope of his office or employment and remains liable for willful misconduct committed outside the scope of his office or employment. *Johnson v. Townsend*, 2005 U.S. Dist. LEXIS 31043, at **9-10 (M.D. Pa. Nov. 8, 2005) (citing *Watkins v. Pa. Bd. of Prob. & Parole*, 2002 U.S. Dist. LEXIS 23504, at *24 (E.D. Pa. Nov. 25, 2002)). "Under Pennsylvania law, an employee acts within the 'scope of his employment' when [he] engages in conduct of the kind the employee is employed to perform, when the conduct occurs 'substantially within the authorized time and space limits,' and when the conduct is 'actuated, at least in part, by a purpose to serve' the employer." *Johnson v. Knorr*, 2005 U.S. Dist. LEXIS 28860 (E.D. Pa. Oct. 31, 2005) (citing Restatement (Second) of Agency § 228(1) (1958); *Aliota v. Graham*, 984 F.2d 1350, 1359 (3d Cir. 1993) (predicting that Pennsylvania Supreme Court would follow Restatement (Second) of Agency to determine scope of employment question)). Even willful misconduct does not vitiate a Commonwealth employee's immunity if the employee is acting within the scope of his employment, including intentional acts which cause emotional distress. *Holt v. N.W. Pa. Training P'ship. Consortium*, 694 A.2d 1134, 1140 (Pa. Commw. Ct. 1997) (citing *Faust*, 592 A.2d at 839-840 (Pa. Commw. Ct. 1991)). With respect to the plaintiff's factual assertions, it cannot be said that Dohman and Lorenzo were acting outside the scope of their employment with DOC when they attempted to have plaintiff participate in an internal sting operation against corrupt prison officials, or took other actions against plaintiff, such as placing him in administrative custody or seizing his property. At all times they were acting as DOC and/or Graterford prison officials, thus sovereign immunity applies. Therefore, to

the extent plaintiff seeks damages under the Pennsylvania Constitution, those claims are barred by sovereign immunity.

Sovereign immunity, however, will not bar certain suits in equity. *See Fawber v. Cohen*, 532 A.2d 429, 433 (Pa. 1987). The Pennsylvania Supreme Court has stated:

> The distinction is clear between suits against the Commonwealth which are within the rule of its immunity and suits to restrain officers of the Commonwealth from enforcing the provisions of a statute claimed to be unconstitutional. Suits which seek to compel *affirmative action on the part of state officials or to obtain money damages or to recover property from the Commonwealth* are within the rule of immunity; suits which simply seek *to restrain state officials* from performing affirmative acts are not within the rule of immunity.

Id. at 433-34 (quoting *Phila. Life Ins. Co. v. Commw.*, 190 A.2d 111, 114 (Pa. 1963) (emphases in original)). Further, although declaratory relief does affirmatively impact the functioning of state officials administering state statutory law, it does not directly compel an affirmative act, thus a litigant may seek declaratory relief even where sovereign immunity would bar other forms of relief. *Fawber*, 532 A.2d at 434; *see also Legal Capital, LLC v. Medical Prof'l Liab. Catastrophe Loss Fund*, 750 A.2d 299, 302 (Pa. 2000) (stating "sovereign immunity does not apply because it is not applicable to declaratory judgment actions"). Here, plaintiff seeks several types of relief, including declaratory relief, mandatory and prohibitive injunctive relief, and damages. It is not entirely clear which forms of relief he seeks under the Pennsylvania Constitution. Indeed, plaintiff does not even assert the section of the Pennsylvania Constitution on which he relies. However, to the extent plaintiff asserts claims under the Pennsylvania Constitution seeking damages and mandatory injunctive relief, such claims are barred by sovereign immunity and defendants' motion to dismiss is granted. To the extent plaintiff seeks prohibitive injunctive relief or declaratory relief under the Pennsylvania Constitution, such

claims may proceed and defendants' motion to dismiss is denied.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DARNELL C. COOPER, Plaintiff	:	CIVIL ACTION
v.	:	NO. 06-0171
JEFFREY BEARD, et al., Defendants.	:	

Order

AND NOW, this _____ day of November 2006, upon careful consideration of defendants' motion to dismiss (Doc. # 10) and reply to plaintiff's opposition (Doc. # 17), and plaintiff's briefs in opposition to the motion (Doc. # 16, # 18, # 19), it is hereby ORDERED that the motion is:

(1) DENIED with respect to plaintiff's retaliation claims, based on his use of the prison grievance process and his refusal to participate in a prison sting operation;

(2) GRANTED as to plaintiff's claims for damages stemming from defendants' retaliation against plaintiff due to his refusal to participate in a prison sting operation, as such claims are barred by qualified immunity;

(3) GRANTED as to all claims against individual defendants Robert S. Bitner and Sharon M. Burks, who are hereby DISMISSED as parties to this action; and

(4) GRANTED as to claims plaintiff asserts under the Pennsylvania Constitution for

damages and mandatory injunctive relief, as those claims are barred by sovereign immunity;

It is further ORDERED that:

defendants shall file an answer within twenty (20) days.

_____

William H. Yohn, Jr., Judge